

UCM OIL-TEX THREADING LTD

v.

PP TECHNOLOGY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

HISHAMUDIN YUNUS J

[CIVIL SUIT NO. D6-28-675-99]

22 APRIL 2003

C

D

E

F

G

Held (granting the application):

H

I

Case(s) referred to:

Denney v. John Hudson & Co Ltd [1992] BCLC 901
BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd [1996] 1 BLJ 307
Re Steame's (Bournemouth) Ltd [1950] 1 All ER 21

A

Legislation referred to:

Companies Act 1965, ss. 219(2), 223

B

Other source(s) referred to:

Loh Siew Cheang, *Corporate Powers: Accountability*, 2nd edn, p 1263

For the petitioner - Eileen Yeoh; M/s Azman Davidson
For the respondent - HL Ooi; M/s Ranjit Ooi & Robert Low
For the applicant - Sherlene Yogeswari; M/s Shearn Delamore

C

Reported by Suhainah Wahiduddin

D

JUDGMENT**Hishamudin Yunus J:**

[1] This is a summons-in-chambers application by the applicant, Hong Leong Bank Bhd ('Hong Leong'), for a validation order pursuant to s. 223 of the Companies Act 1965.

E

[2] Section 223 of the Companies Act provides:

Avoidance of disposition of property, etc.

F

223. Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

G

[3] The statutory purpose of s. 223 is:

... to impose liability on a disponent, not to impose restitutionary liability on a bank.

[4] (See *Corporate Powers: Accountability* 2nd edn by Loh Siew Cheang, p. 1263.)

H

[5] The power of the court to validate dispositions of property made post presentation of petition is provided by the words:

I

... unless the Court otherwise orders ...

appearing in the above provision (s. 223).

A [6] In the present case, the application by Hong Leong is for the validation of:

(a) a National Land Code charge dated 16 September 1999, registered with the Registrar of Titles, Selangor, on 21 September 1999 in favour of the applicant, Hong Leong, and
B registered with the Registrar of Companies on 22 September 1999; and

(b) a debenture dated 16 September 1999, registered with the Registrar of Companies on 22 September 1999, also in favour
C of the applicant, Hong Leong.

[7] The above charge and debenture, unless validated by this court, are void by virtue of s. 223 of the Companies Act since they were created and registered subsequent to the commencement
D of the winding up by the court, that is to say, subsequent to the presentation of the petition (see s. 219(2) of the Companies Act).

[8] This application was opposed by the petitioner. However, the learned counsel for liquidator/respondent took a neutral stand: she neither opposed nor supported the application.
E

[9] I granted the application based on the following principles.

[10] A disposition carried out in good faith in the ordinary course of business when the parties were unaware of a pending petition would usually be validated, unless the court is satisfied that the transaction was an attempt to give preference to the disponent
F (see *Denney v. John Hudson & Co Ltd* [1992] BCLC 901).

[11] In *Re Steame's (Bournemouth) Ltd* [1950] 1 All ER 21, Vaisey J said:
G

The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every
H kind of judicial discretion.

[12] The absence of knowledge of the existence of a winding up petition is a 'very powerful factor in favour of validation' (see *BSN Commercial Bank (M) Bhd. v. River View Properties Sdn Bhd* [1996] 1 MLJ 872, per Abdul Malik J at p. 882).
I

[13] In the present case, in order to determine the presence or absence of knowledge on the part of the applicant, Hong Leong, let us consider the following chronology of events.

- [14]** First, the winding-up petition was presented to the court on 10 August 1999. For the purpose of s. 223 this date is the material date: this is the date of the ‘commencement of the winding-up by the court’. **A**
- [15]** The petition was served on the Registrar of Companies on 18 September 1999. **B**
- [16]** The petition was advertised in the Malay Mail on 29 September 1999 and 30 September 1999.
- [17]** The petition was advertised in The Star on 1 October 1999 and on 2 October 1999. **C**
- [18]** The petition was published in the Gazette on 14 October 1999 and on 19 October 1999.
- [19]** The petition was served on the respondent on 20 October 1999. **D**
- [20]** The winding-up order against the respondent was granted by the court on 28 October 1999.
- [21]** Hong Leong only became aware of the petition on or about the first week of January 2000. **E**
- [22]** Bearing the above chronology of events pertaining to the winding-up proceeding, let us now examine the chronology of events concerning the transactions between Hong Leong and the respondent that eventually resulted in the creation of the charge and debenture and the registration of the same with the relevant statutory authorities. **F**
- [23]** To begin with, the respondent, sometime in late 1998, applied to Hong Leong for banking facilities amounting to RM3,400,000. The purposes were, firstly, to redeem banking facilities totaling RM2,600,000 granted to the respondent by Oriental Bank Bhd; and, secondly, to provide the respondent with working capital. **G**
H
- [24]** Hong Leong approved the respondent’s application and issued a letter of offer dated 12 November 1998 to the respondent.
- [25]** The facilities made available by Hong Leong to the respondent were meant to be on a secured basis, the securities being a first party National Land Code charge (over a piece of **I**

A land in Kajang belonging to the respondent) and a first party debenture creating a fixed and floating charge over all assets and property of the respondent favouring Hong Leong.

[26] Hong Leong's letter of offer was accepted by the respondent on 2 December 1998.

B [27] Hong Leong, on 30 December 1998, made a winding-up search at the office of the Registrar of Companies and the search revealed that the respondent did not have any winding-up order entered against it.

C [28] However, there was a delay in the processing of the facilities because of a Perwira Affin Bank Bhd (Perwira Affin) debenture dated 4 December 1993 (previously unknown to Hong Leong) over the fixed and floating assets of the respondent which had to be discharged before the debenture and National Land Code charge favouring Hong Leong could be created.

D [29] Eventually after protracted correspondences between Perwira Affin and Hong Leong's solicitors, the facilities agreement was executed on 16 September 1999.

E [30] The National Land Code charge, dated 16 September 1999, was registered with the Registrar of Titles, Selangor, on 21 September 1999 in favour of Hong Leong, and registered with the Registrar of Companies on 22 September 1999.

F [31] The debenture dated 16 September 1999 was registered with the Registrar of Companies on 21 September 1999.

G [32] Whilst the documentation was pending, the respondent sought *ad hoc* release of the facilities offered by Hong Leong.

H [33] Unaware of the petition on the part of both Hong Leong and the respondent, Hong Leong allowed the respondent to utilise and drawdown on the facilities. The facilities were released in stages to the respondent between 23 June 1999 and 16 August 1999.

I [34] I am satisfied from the facts of the present case that both Hong Leong and the respondent, at the time of creating and registering the charge and debenture, were not aware of the presentation of the petition. Hence, the dispositions of the properties (ie, the debenture and the charge) were done in good faith.

[Order in terms in respect prayers (1) and (3)]